UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 98-1665 (LFO, MBG, CKK)
	)	
WILLIAM JEFFERSON CLINTON, *et al.*,	)	
	)	
Defendants.	)	
	)	
CLIFFORD ALEXANDER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 98-2187 (LFO, MBG, CKK)
	)	
WILLIAM M. DALEY, Secretary of Commerce, *et al.*,	)	
	)	
Defendants.	)	

OBERDORFER, J, dissenting in part, and concurring in part[1]:

> *We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

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[1] I agree with the majority that the plaintiffs have standing to pursue their claims for representation in the House of Representatives. *See* Maj. Op. Part III. I also agree that the claims against the Senate defendants and the District of Columbia Financial Responsibility and Management Assistance Authority (the Control Board) do not involve apportionment, the sole business of this three-judge court. *See* Maj. Op. Part II. Accordingly, those claims are addressed in a separate memorandum and order, also filed today. *See Adams v. Clinton*, Nos. 98-1665, 98-2187 (D.D.C. Mar. 20, 2000).

U.S. Const. preamble.

In 1964, the Supreme Court first recognized that Article I of the Constitution requires States to honor a "one person, one vote" rule in their conduct of elections for the House of Representatives, saying that:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964) (emphasis added). More than 30 years after *Wesberry*, and more than 200 years after ratification of the Constitution, plaintiffs charge, inter alia, that the Secretary of Commerce is obstructing several hundred thousand American citizens – the inhabitants of the District of Columbia – from their exercise of this "precious" right, and seek vindication of that right. An examination of the relevant facts and law yields, to me, the following conclusions:

(1) Article I, section 2, of the Constitution states, in relevant part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." U.S. Const. art. I, § 2. Section 2 of the Fourteenth Amendment, which replaced but did not materially alter part of Article I, section 2, provides, in relevant part: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." *Id*. amend. XIV.

(2) During the years between when the Constitution took effect in 1789 and the federal government's assumption of exclusive jurisdiction over the area that became the District of Columbia in 1801, inhabitants of that area were "People of the several States," who, among other things, were

apportioned as mandated, U.S. Const. art. I, § 2, and were entitled to, and enjoyed, the right to vote for voting representation in the House of Representatives, either through Maryland or Virginia, *see infra* Part I.B.3.

(3) The "People of the several States" who voted between 1789 and 1801 in the part of Maryland which became the District[2] thereby secured for themselves and their political posterity a constitutionally-protected right to be included in a cohort to which a Representative in Congress is apportioned and, if otherwise eligible, to vote for voting representation in the House of Representatives.

(4) In 1791**,** Maryland had ratified its cession to the United States of the portion of its territory which is now the District of Columbia, specifically including "persons residing or to reside thereon," but provided that it would continue to exercise jurisdiction until "Congress shall, by law, provide for the government thereof." An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2, *reprinted in* 1 D.C. Code Ann. 34, 35 (1991).

(5) The District became the permanent Seat of Government in December 1800, *see* An Act for Establishing the Temporary and Permanent Seat of Government of the United States, 1 Stat. 130, ch. 28, § 6 (1790), and the cession was finally consummated by the Organic Act of 1801, 2 Stat. 103, ch. 15 (1801). At no time did either Maryland or the United States make any provision for either termination or continuation of the apportionment, or of the voting rights, of the "persons" ceded by Maryland to the United States. No provision in any cession instrument purported to take away the pre-existing right of those "persons" to be apportioned and to vote for voting representation in the House of

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[2] In 1846, those portions of Virginia which had been ceded to the United States to form the District were retroceded to Virginia. *See infra* note 23.

Representatives. In any event, the decisions of the Supreme Court in *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933) (constitutional rights not lost at cession) and *Lucas v. Colorado*, 377 U.S. 713, 736 (1964) (constitutional voting rights of minority not waivable by majority), establish that neither the United States, nor any of its officers, could constitutionally interfere with that right of "persons" ceded to the United States or their political posterity.

(6) Nevertheless, ever since 1801, it has been assumed by some, but never authoritatively decided, that District inhabitants have no right to apportionment and to vote for voting representation in the House of Representatives.[3] On that assumption, the Secretary of Commerce intends to follow the practice of previous Secretaries to exclude inhabitants of the District of Columbia from his report to the President by which he performs his statutory duty to apportion the population of the several States and the membership of the House of Representatives, *see* 13 U.S.C. § 141(b), thereby obstructing voting representation of District inhabitants in the House.

(7) *Wesberry* teaches that in such circumstances it behooves the judiciary to test thoroughly any purported necessity for such a practice and the assumptions underlying it. *Wesberry*, 376 U.S. at 17-18. As the Supreme Court subsequently declared: "that an unconstitutional action has been taken before does not render the action any less unconstitutional at a later date." *See Powell v.*

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[3] *See Heald v. District of Columbia*, 259 U.S. 114, 124 (1922) (dictum stating that "[r]esidents of the District lack the [right of] suffrage"); *see also Loughborough v. Blake*, 18 U.S. 317, 324 (1820) (dictum stating that inhabitants of the District are "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government . . . .") (Marshall, C.J.); infra Part II.B, II.C.2.c.vi; Maj. Op. at notes 29, 30, 32, 34 and accompanying text (summarizing statements of various Congressmen and commentators around time of adoption of Organic Act of 1801).

McCormack, 395 U.S. 486, 546-47 (1969). After thoroughly considering the various arguments, I have found nothing that necessitates federal officials continuing the practice of obstructing the "precious" constitutional right of the inhabitants of the District of Columbia to vote for voting representation in the House of Representatives. *See Wesberry*, 376 U.S. at 17-18.

(8) In addition, the Equal Protection Clause of the Fourteenth Amendment, incorporated into the Bill of Rights' Fifth Amendment and thereby made applicable to the national government,[4] requires a declaration that inhabitants of the District of Columbia have and should henceforth enjoy the same right to apportioned representation in the House of Representatives as that enjoyed by residents of other federal enclaves,[5] former residents of States who live abroad,[6] as well as residents of States.

Accordingly, I would hold that both Article I and principles of equal protection require this Court to declare that qualified residents of the District have a constitutional right to vote for voting representation in the House of Representatives, and declare that 13 U.S.C. § 141(b), as construed and applied by the Secretary of Commerce, unconstitutionally obstructs their enjoyment of that right.

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[4] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217-18 (1995); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

[5] *Evans v. Cornman*, 398 U.S. 419, 426 (1970).

[6] Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff.

I

Although the facts have been well stated by my colleagues, some repetition and addition are necessary to bring the issues into focus for purposes of this dissent.

A

Article I of the original Constitution specifies that "Representatives . . . shall be apportioned among the several States" according to an "actual Enumeration" of persons made every ten years. U.S. Const. art. I, § 2, cl. 3. The Fourteenth Amendment has superceded in part, but not substantively altered, this requirement. *Id.* amend. XIV, § 2. Section 141(b) of Title 13 of the United States Code makes the Secretary of Commerce responsible for conducting the enumeration and providing the President with a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). The statute directs the President to transmit to the Congress "a statement showing the whole number of persons in each State . . . as ascertained under . . . each . . . decennial census, and the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a). Finally, the Clerk of the House is responsible for sending the "executive of each State a certificate of the number of Representatives to which each such State is entitled." 2 U.S.C. § 2a(b).

On December 26, 1990, a predecessor of the incumbent Secretary sent to President George Bush "a statement showing the apportionment population for each State as of April 1, 1990, tabulated from the 1990 Decennial Census." Statement of Undisputed Facts of Plaintiffs *Alexander et al.* with Supporting Declarations and Exhibits, Tab. 3. The statement included a determination of "the number of Representatives to which each State is entitled." *Id.* The statement allocated to every State at least

one Representative. *Id.* The statement did not report the population of the District of Columbia,[7] include the District's population in the population of any State, or include its population in the total population used for apportionment purposes. *Id*. Nor did it allocate Representatives to the District. *Id.* The incumbent Secretary, a defendant here, intends to follow his predecessor's practice, as evidenced by his opposition to plaintiffs' motions. There being no allocation of Representatives, no transmittal by the President to the Clerk of the House, and no certificate by the Clerk to the District, the present practice of the Secretary obstructs inhabitants of the District from exercising their constitutional right to vote for voting representation in the House of Representatives. Meanwhile, the Secretary includes in his apportionment of persons and allocates representatives to residents of federal enclaves and Congress permits voting, even where there may be no apportionment, by persons residing overseas who formerly resided in a State.

B

Plaintiffs' claims present constitutional questions, the resolution of which requires examination of a broad sweep of political and legal history, including particularly the circumstances preceding and surrounding the adoption of the Seat of Government clause in the Constitution, the Maryland cession of territory and "persons" to the United States to form the District, the exercise by District residents of

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[7] According to the 1990 Decennial Census, the population of the District of Columbia as of April 1, 1990, was approximately 607,000. U.S. Census Bureau, The Official Statistics, Statistical Abstract of the United States (1998). As of 1990, there were three States with populations less than the District, each of which were each allocated one Representative: Alaska, population: 551,947; Vermont, population: 564,964; Wyoming, population: 455,975. *Alexander* Plaintiffs' Statement of Undisputed Facts, Tab 3. There were three States with populations under 700,000 which were also each allocated one Representative: Delaware, population: 668,696; North Dakota, population: 641,364; South Dakota, population: 699,999. *Id.*

their right to vote for voting representation in Congress between 1790 and 1800, the evolution of the District of Columbia as a political entity from 1790 through the present, the favorable judicial and legislative treatment accorded similar claims by residents of federal enclaves (other than the District of Columbia) and to United States citizens residing outside the United States – all viewed in the light of the evolving applications of the post-Civil War Amendments and Acts of Congress in the latter half of the Twentieth Century with respect to voting rights.

1. The Seat of Government Clause

Before the adoption of the Constitution, there was no fixed national seat of government. Congress met in a number of locations.[8] In 1783, while meeting in Philadelphia, hundreds of angry Revolutionary War veterans surrounded the State House and demanded compensation for their services.[9] Neither the city of Philadelphia nor the State of Pennsylvania acted to protect Congress from the disturbances.[10] At the Constitutional Convention in 1787,[11] mindful of this so-called Philadelphia

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[8] From 1774 through the end of the Revolutionary War in 1783, Congress met in Philadelphia, Baltimore, and York, Pennsylvania. From 1783 through 1789, it met primarily in Philadelphia, but also in Princeton, New Jersey, Annapolis, Maryland, Trenton, New Jersey, and New York City. *See* Kenneth R. Bowling, The Creation of Washington, D.C. 15-19, 43-73 (1991); Walter Fairleigh Dodd, The Government of the District of Columbia 11-13 (1909); William Tindall, Origin and Government of the District of Columbia 13, 30-57 (1909).

[9] *See* Dodd, *supra* note 8, at 12-13; 2 Joseph Story, Commentaries on the Constitution § 1219 (Melville M. Bigelow, 5th ed. 1905); Bowling, *supra* note 8, at 29-34.

[10] *See* 2 Story, *supra* note 9, § 1219; Bowling, *supra* note 8, at 29-34; Dodd, *supra* note 8, at 13; Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 Georgetown L.J. 207, 209 (1957-58).

[11] On February 21, 1787, Congress had called for "a convention of delegates . . . appointed by the several states" to meet in Philadelphia to propose revisions to the 1781 Articles of Confederation.

(continued...)

Mutiny, the Framers sought to ensure that the national government would be free from interference by any State government and from dependence upon any State for protection.[12] As explained by James Iredell, at North Carolina's 1789 ratifying convention:

> What would be the consequence if the seat of government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating? Do we not all remember that, in the year 1783, a band of soldiers went and insulted the Congress? The sovereignty of the United States was treated with indignity. They applied for protection to the state they resided in, but could obtain none. It is to be hoped such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.

Elliot's Debates at 219-20, *reprinted in* 3 Philip B. Kurland & Ralph Lerner, The Founders' Constitution 225 (1987). Similarly, James Madison, in The Federalist, published while New York was deciding on ratification, defended "[t]he indispensable necessity of complete authority at the seat of government" on the grounds that

> [w]ithout it not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State . . . for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy.

The Federalist, No. 43, at 272 (James Madison) (Clinton Rossiter ed. 1961).

These considerations, particularly the pre-Convention experience with the shifting location of

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[11] (...continued)
Documents Illustrative of the Formation of the Union of American States (Charles C. Tansill ed. 1927).

[12] 2 Story, *supra* note 9, § 1219; Dodd, *supra* note 8, at 19; Bowling, *supra* note 8, at 84. Some delegates also objected to the impermanency of the site of Congress' meetings. As Rufus King of Massachusetts stated, "[t]he mutability of the place had dishonored the federal [Government] and would require as strong a cure as we could devise." 3 Philip B. Kurland & Ralph Lerner, The Founders' Constitution 218 (1987); *see* Bowling, *supra* note 8, at 75-76; Dodd, *supra* note 8, at 19.

the Continental Congress and exigencies such as the Philadelphia Mutiny which provoked Congress to move from time to time, prompted the inclusion of the Seat of Government clause in Article I of the Constitution.[13] The clause provides:

> The Congress shall have the Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Arsenals, dock-Yards and other needful buildings;

U.S. Const. art. I, § 8, cl. 17. The Framers did not select a location for the Seat of Government, nor place any constraints on where that location should be, primarily to avoid offending either Philadelphia or New York, both of which might expect to be selected.[14] Instead, they left that potentially contentious decision to Congress.[15]

Neither the Seat of Government clause, nor any other provision of the Constitution, expressly mentions voting by, or representation of, inhabitants of the yet-to-be-selected Seat of Government. Indeed, the delegates to the Convention discussed and adopted the Seat of Government clause, and the remainder of the Constitution, without any recorded debate on its implications for the voting,

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[13] *See* 2 Story, *supra* note 9, § 1219; Franchino, *supra* note 10, at 209.

[14] Indeed, George Mason withdrew his proposal that would have prohibited the Seat of Government from occupying the same location as any State's seat of government, which he made because he thought that joint capitals would lead to jurisdictional disputes and lower the tone of the national legislature's deliberations, in the face of concerns that such prohibition "might make enemies of [Philadelphia and New York] which had expectations of becoming the Seat of the [General Government]." 3 Kurland & Lerner, *supra* note 12, at 218; Bowling, *supra* note 8, at 75; Dodd, *supra* note 8, at 19-20

[15] *See* Dodd, *supra* note 8, at 20.

representation or any other rights of the inhabitants of federal enclaves, including the yet-to-be-selected Seat of Government.[16]

2. Cession

Between 1788 and 1801, Maryland and Virginia ceded, and the United States accepted, the area which became the Seat of Government. It is undisputed that none of the pertinent documents contain a word about the voting rights of the persons to be ceded.

On December 23, 1788, Maryland offered Congress "any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States." An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of the Government of the United States, 1788 Md. Acts ch. 46, *reprinted in* 1 D.C. Code Ann. 33-34 (1991). On December 3, 1789, Virginia similarly offered "a tract of country not exceeding ten miles square, or any lesser quantity, to be located within the limits of the State . . . as Congress may by law direct, shall be, and the same is hereby forever ceded and relinquished to the Congress and Government of the United States." 13 Va. Stat. at Large, ch. 32, *reprinted in* 1 D.C. Code Ann. 32-33 (1991). Virginia's offer contained the proviso that "the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing with the limits of the cession aforesaid, shall not cease or determine until Congress, having accepted the said cession, shall, by law, provide for the government thereof, under their jurisdiction." *Id.* Meanwhile, a number of other sites

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[16] *See* Bowling, *supra* note 8, at 75. The only references to voting by the inhabitants by the yet-to-be-selected Seat of Government occurred during the ratification process. These references, by James Madison, Alexander Hamilton and Thomas Tredwell, are discussed in detail *infra* § Part II.C.2.b.

made strong bids for selection as the permanent Seat of Government.[17]

In July 1790, the first Congress of the United States, greatly influenced by President Washington, "accepted for the permanent seat of government of the United States" "a district of territory, not exceeding ten miles square," to be located within the territories offered by Maryland and Virginia. 1 Stat. 130, ch. 28, § 6. This Act also provided that Philadelphia would serve as the temporary seat of government until December 1, 1800, at which time the seat of government would transfer to its permanent location within the "district" accepted by the Act. *Id.* §§ 5, 6. By the terms of this Act, the laws of Virginia and Maryland continued to operate within the District of Columbia "until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." *Id.* § 1 (emphasis added).

The boundaries of the permanent seat of government were fixed by Presidential proclamation of March 30, 1791. *See Morris v. United States*, 174 U.S. 196, 200 (1899). Later that year, commissioners appointed by President Washington chose the names "Washington" for the federal city and "Columbia" for the federal district.[18] There was no District of Columbia political entity created at that time, although the municipal corporations of Alexandria and Georgetown continued to exist.

On December 19, 1791, Maryland passed an act ratifying the cession. It provided that the portion of the Seat of Government "which lies within the limits of this State shall be . . . forever ceded and relinquished to the Congress and the Government of the United States, and full and absolute right

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17 *See* Bowling, *supra* note 8, at 129.

18 *See* Tindall, *supra* note 8, at 94.

and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon," while retaining jurisdiction over "persons and property of individuals residing within the limits" of the territory it ceded until Congress assumed jurisdiction. An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2, *reprinted in* 1 D.C. Code Ann. 34, 35 (1991).

On the first Monday in December 1800, as provided by the 1790 Act, the District became the permanent Seat of Government of the United States. 1 Stat. 130, ch. 28, § 6. On February 27, 1801, Congress enacted the "Organic Act of 1801," thereby assuming exclusive jurisdiction over the District. 2 Stat. 103, ch. 15. That Act divided the District into two counties — Washington and Alexandria; it also, *inter alia*, provided that the laws of the Maryland and Virginia would continue to apply to the respective parts of the District of Columbia which had been ceded by each state; established a federal court for the District of Columbia; established a marshal for the District; and provided that an attorney for the United States should be appointed for the District. *Id.* In 1800, the population of the ten-mile square area constituting the original Seat of Government totaled approximately 8,000, of whom approximately 6,000 were white, and approximately 2,000 were black.[19]

3. Voting in the District Between 1790 and 1800

There is undisputed historical evidence, and I would find, that from 1790 through 1800, qualified residents in what was proclaimed in 1791 to be the District continued to vote in the elections of federal officers conducted in Maryland and Virginia, including Representatives in Congress, even though Maryland and Virginia had ceded the land to the federal government and the boundaries of the

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[19] U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition, Part 2, at 26 (1975).

District had been drawn.[20]

Following Congress' enactment of the Organic Act in 1801, and the assumption of exclusive jurisdiction by the United States, Maryland and Virginia no longer permitted inhabitants of the District to vote in their local, state and federal elections.[21] At that time, there was no District government or voting apparatus and Congress made no provision for voting by inhabitants of the District. It was generally assumed that inhabitants of the District would no longer enjoy the right to vote for voting representation in the House of Representatives.[22] And, in fact, since then no inhabitant of the portion of the District ceded by Maryland has voted for voting representation in the House of Representatives.[23]

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[20] *See* Memorandum Amici Curiae at 17 (filed Feb. 26, 1999); Tindall, *supra* note 8, at 17; Peter Raven-Hansen, Congresssional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 174 (1975). In addition, there is direct evidence that residents of the District between 1790 and 1800 were eligible to vote for Congressional representatives through the ceding state. For example, Thomas Beall, a resident of Georgetown during those years, an area encompassed by the newly-drawn District boundaries, was a representative in the Maryland House of Delegates in 1800. Archive of Maryland, new series I, An Historical List of Public Officials of Maryland, Vol. 1, at 229 (Maryland State Archives, 1990). The Maryland Constitution then in effect required that representatives to its house of delegates be eligible to vote in the county which they represented. Maryland Constitution (1776). The United States Constitution provides that those persons eligible to vote for representatives to the "most numerous branch of the State Legislature" are also eligible to vote for the House of Representatives. U.S. Const. art. I, § 2. Accordingly, Thomas Beall, a resident of the District, was eligible to vote in Maryland's state and federal elections in 1800 (and almost surely voted for himself!). A Biographical Dictionary of the Maryland Legislature, 1635-1789, Vol. 1: A-H, at 124 (Edward C. Papnefuse, Alan F. Day, David W. Jordan, Gregory A. Stiverson eds.).

[21] Tindall, *supra* note 8, at 17; Raven-Hansen, *supra* note 20, at 174-76.

[22] *See* Maj. Op. at notes 29, 30, 32, 34 and accompanying text.

[23] On July 9, 1846, Congress authorized the retrocession to Virginia of the County of Alexandria, contingent on the assent of its residents. An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, 9 Stat. 35 (1846). In a submission to Congress, a "committee

(continued...)

4. Evolution of a District of Columbia Voting Apparatus

In 1802, the District included five jurisdictions: the counties of Alexandria and Washington, the towns of Alexandria and Georgetown, and the City of Washington.[24] For the period from 1800 through 1871, however, there was no elected government for the District of Columbia as a whole.[25]

In 1871, Congress first authorized a comprehensive local government for the District, consisting of a governor appointed by the President, and a unicameral 22-member house of delegates elected by the male citizens of the District. An Act to Provide a Government for the District of Columbia, 16 Stat.

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[23] (...continued)
appointed by the common council of Alexandria" described some of the motives for seeking retrocession:

> We are deprived of the elective franchise, a privilege so dear and sacred that we would present its deprivation in the strongest light before your honorable body. Side by side with trial by jury and the writ of habeas corpus may be placed the rights of the ballot box. It is not unworthy to remark that while the principles of free government are yearly extending with the rapid march of civilization, and thrones and dynasties are yielding to their influence, here alone in the 10 miles square in and about the capital of this great country is there no improvement, no advance in popular rights.

Tindall, *supra* note 8, at 110. The committee also mentioned the failure of Congress to regularly update the laws of Virginia, which, absent congressional revision, had remained in effect throughout Alexandria County in their 1801 form. *Id.* at 109-110. After the retrocession took effect, the District of Columbia consisted entirely of only the territory ceded by Maryland.

[24] *See* Dodd, *supra* note 8, at 30.

[25] As distinguished from the municipalities of Washington, Georgetown and (from 1790 to 1846) Alexandria. Congress incorporated the City of Washington in 1802, providing for a council elected annually "by the free white male inhabitants of full age, who have resided twelve months in the city, and paid taxes therein the year preceding the election's being held." An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, 2 Stat. 195, ch. 53, § 2 (1802). The County of Washington was governed by a "levy court" the members of which were appointed by the President. *See* Dodd, *supra* note 8, at 27-38. In 1805, Congress provided Georgetown with a council elected along the lines of the City of Washington's. *Id.*

419, ch. 62 (1871). That form of representative local government was short-lived; Congress abolished it in 1874. An Act for the Government of the District of Columbia, and for Other Purposes, 18 Stat. 116, ch. 337 (1874). From 1874 until 1967, three unelected Commissioners, appointed by the President, governed the District. *Id*.; An Act Providing a Permanent Form of Government for the District of Columbia, 20 Stat. 102, ch. 180 (1878).[26] In 1967, Congress replaced the Board of Commissioners with an appointed 9-member Council and an appointed Commissioner. Reoganization Plan No. 3 of 1967, 32 F.R. 11669.

It was not until the early 1960's that the voting landscape in the District began to change. On March 29, 1961, the Twenty-third Amendment was ratified. It gave residents of the District of Columbia the right to appoint electors for the election of the President and Vice President of the United States.[27] In 1970, Congress authorized residents of the District to elect a non-voting delegate to the

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[26] *See also* Tindall, *supra* note 8, at 141; *see generally* Franchino, *supra* note 10, at 214-223.

[27] The Twenty-Third Amendment provides:

> Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:
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> > A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

U.S. Const. amend. XXIII.

House of Representatives. *See* 2 U.S.C. § 25a. As a corollary, in the wake of the Twenty-third Amendment and the 1970 provision for election of a non-voting delegate to the House, the District became equipped with a rudimentary voting system.

In 1973, Congress further relaxed its "exclusive legislation" power over the District by passage of the Home Rule Act of 1973.[28] *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). By that Act, Congress granted District citizens the right to elect a Council authorized to enact local legislation, subject to Congress' ultimate authority, provided the District with an elected Mayor, and further perfected the election apparatus earlier created to administer presidential and non-voting delegate elections. *Id*. Congress created the District government "to relieve Congress of the burden of legislating essentially local District matters." *Id*. A few years earlier, the Court Reorganization Act of 1970 had created state-like courts of general jurisdiction whose appellate decisions are appealable directly to the Supreme Court by the same process that state court decisions are appealable.[29] In 1995, Congress established the Control Board, consisting of five members appointed by the President, to "eliminate budget deficits and management inefficiencies in the government of the District of Columbia." Pub. L. No. 104-8, 109 Stat. 97 (1995).

Meanwhile, the population of the District, which in 1800 had been less than one fifth of the

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[28] Over the years, Congress has similarly relaxed its exclusive jurisdiction in enclaves. *See infra* Part III.

[29] The judges of these courts are appointed by the President, and they displace the general jurisdiction formerly exercised by the federal District Court and Court of Appeals for the District of Columbia.

smallest state, Delaware,[30] and less than a quarter of that contemplated by the Northwest Ordinance of 1787 for the admission of a new state,[31] had burgeoned by 1990 to over 600,000 — a number more than equal to the population of several states, *see supra* note 7.

5. Evolution of Voting Rights Nationally

Paralleling the evolution of the District of Columbia and a voting apparatus therein, was the evolution of voting rights nationally, "a continuing expansion of the scope of the right of suffrage in this country." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Voting nationally has evolved from 18th century suffrage limited to white, property-owning, tax-paying males, over the age of 21, to the virtual universal suffrage today enjoyed by all but minors, felons, and the people of the District of Columbia. *See also* Alexander Plaintiffs Memorandum in Support of Motion for Summary Judgment, Appendix A.

II

ARTICLE I

The foregoing facts bring the following legal considerations into focus. In *Wesberry*, the Supreme Court considered whether state laws creating congressional voting districts with widely disproportionate populations violated the voting rights of inhabitants of less populous district guaranteed to them by Article I, section 2 of the Constitution. The Court concluded that the Constitution requires

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30 Delaware's population in 1800 was approximately 64,000; the District's was approximately 8,000. U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition, Part 2, at 25 (1975).

31 The Northwest Ordinance of 1787, ratified by the First Congress in 1789, provided that new states created from the lands of the Northwest Territories needed a minimum population of 50,000 before they could be admitted to the Union. *See* 1 Stat. 50-52.

that districts be apportioned so as to satisfy as nearly as possible the maxim "one person, one vote." *Wesberry*, 376 U.S. at 18. The plain statement in *Wesberry*, bears repeating:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right.

Wesberry, 376 U.S. at 17-18 (emphasis added). For people in the District of Columbia, Congress is the ultimate "exclusive" legislature. The Secretary's continued failure to include the people of the District of Columbia in apportionment contributes to their heretofore permanent disenfranchisement in their ultimate legislature – Congress – because the place where they live, once part of the State of Maryland, is not now literally a State. Those who would interfere with the exercise of the "precious" right to vote have a heavy burden of persuasion and proof that their interference is "necessary." To put it simply, the defendants have failed to persuade me that it is necessary for the Secretary to exclude the people of the District from apportionment and thus interfere with their voting for a Member of the House of Representatives.

A

It would seem to be axiomatic that interference with a person's "precious" right to vote for a Member of Congress, such as that exercised by District inhabitants before 1801, and protected from dilution by the *Wesberry* doctrine, violates a constitutional right. In any event, the Supreme Court long ago determined, and has often reiterated, that such a right has a firm foundation in the Constitution.

In a series of cases, beginning with *Ex parte Yarbrough* (*The Ku-Klux Cases*), 110 U.S. 651 (1884), the Supreme Court has held that the Constitution is the source of, and guarantees protection

for, the right to vote for Members of the House of Representatives. In *Yarbrough*, the Court validated a statute making it a federal crime to interdict voting by force or intimidation because "the exercise of the right [to vote] [for minorities and for other citizens] is guaranteed by the constitution, and should be kept free and pure by congressional enactments whenever that is necessary." *Id.* at 665 (emphasis added). *Yarbrough* clarified the Court's earlier decision in *Minor v. Happersett*, 88 U.S. 162 (1874). In *Minor*, the Court held that the Fourteenth Amendment's privileges and immunities clause did not confer upon females a right to vote, stating that "the Constitution of the United States does not confer the right of suffrage upon any one." *Id.* at 178. The *Yarbrough* Court explained that this statement did not mean that the Constitution conferred the right to vote upon "no one," but only that it did not confer it upon anyone who happened to claim such a right. *Yarbrough*, 110 U.S. at 664. Females were not a class upon whom the Constitution conferred the right to vote because, as the *Minor* court recognized, at the time of its adoption most states did not permit females to vote and because the very text of the Fourteenth Amendment suggested, in another context, that it contemplated only male voters.[32] *Minor*, 88 U.S. at 172-74. Of particular significance for the political posterity of the pre-1801 voters, the

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[32] Section 2 of the Fourteenth Amendment provides (emphasis added):

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis for representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV.

Minor court cautioned that "[t]he right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim the protection, he must first show that he has the right." *Minor*, 88 U.S. at 176.

Since *Yarbrough*, the Supreme Court has never wavered from its conclusion there that voting in federal elections is a constitutionally-protected right. For example, in 1941, the Court held that qualified voters have a right to participate in congressional primary elections, stating that the right to vote in congressional elections "whatever its appropriate constitutional limitations, . . . is a right established and guaranteed by the Constitution." *United States v. Classic*, 313 U.S. 299, 314, 320 (1941). In 1964, the Court started its analysis of the constitutionality of the apportionment of seats in a State legislature from the premise that "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds*, 377 U.S. at 554; *see also Wesberry*, 376 U.S. at 17. A few years later, the Court reiterated that "the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966). More recently, the Supreme Court, in concluding that States may not add to the qualifications for members of Congress that are enumerated in Article I, §§ 2 and 3, observed that "[e]lecting representatives to the National Legislature was a new right, arising from the Constitution itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Accordingly, I would conclude that the inhabitants of the District who voted for representation in the House of Representatives before 1801 were exercising a

right to vote created and protected by the Constitution.

B

It is undisputed that the inhabitants of the District ceased to vote for a Member of the House of Representatives after the enactment of the Organic Act in 1801. Yet, neither the Organic Act nor any of the other statutes or instruments effecting cession purported, by their terms, to extinguish that right. The question remains whether that Act, or the cession transaction as a whole, nonetheless necessarily and otherwise lawfully terminated the pre-1801 voting rights of those persons ceded.

The defendants rely heavily upon Chief Justice Marshall's statement in *Loughborough v. Blake*, 18 U.S. 317, 324 (1820), that the inhabitants of the District were "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." However, any reliance on *Loughborough* as controlling precedent is misplaced. The specific issue before the *Loughborough* Court was whether Congress had the power to impose a direct tax on residents of the District of Columbia, *id.* at 318, even though the tax apportionment clause then in effect, like the voting apportionment clause, refers by its terms only to "States," U.S. Const. art. I, § 2. The Court held that Congress' "power to lay and collect taxes," *id.* art. I, § 8, included such a power, particularly where it had the power of "exclusive legislation," and that the directive in Article I, section 2, that "taxes shall be apportioned among the several states" did not restrict those powers, *Loughborough*, 18 U.S. at 322-25. The statement that District inhabitants "voluntarily relinquished the right to representation," made in response to the argument that taxing the District violated the principle that there should be no taxation without representation, is, at best, dictum. The statement does not authoritatively establish that the District or its people waived any claim to a right

to voting representation in Congress. As Chief Justice Marshall said about dicta in a related context the very next year:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. 264, 399 (1821).

Even if the *Loughborough* dictum were an authoritative conclusion of law (which it was not), it would confirm by necessary inference the pre-1801 voting rights of the people ceded to the District; if they had no such pre-1801 rights they would have had nothing to "relinquish[]." *Loughborough*, 18 U.S. at 324. More important, the Supreme Court has since held that "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate." *Lucas*, 377 U.S. at 736. Although *Lucas* was a Fourteenth Amendment case, the principle it announced does not derive from the Fourteenth Amendment. Rather, the principle that voting rights are not defeasible by majority vote is intrinsic to the concept of a constitutional right. *Cf*. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2229 (1999) ("[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights.") (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Under the *Lucas* principle, *a fortiori*, even if Maryland's cession and the United States' acceptance ended the access of inhabitants of the ceded portion of that State to the Maryland voting apparatus, the cession could not

eliminate the ongoing (albeit inchoate or dormant) constitutional right to voting representation of the District inhabitants ceded there from Maryland and their political posterity.

That pre-cession constitutional rights, absent any lawful waiver, survived the cession is confirmed by Supreme Court opinions in related contexts. In 1901, the Supreme Court addressed the question of whether the provision in Article I, section 8, of the Constitution that states that "all duties, imposts and excises shall be uniform throughout the United States" barred Congress from imposing duties on products coming from the territory of Puerto Rico into the state of New York. *Downes v. Bidwell*, 182 U.S. 244 (1901). In analyzing this question, Justice Brown, announcing the judgment of the Court, revisited the Supreme Court's decision in *Loughborough*, where the Court had held that Congress could impose a direct tax on the people of the District even though the Article I, section 2 stated that "direct Taxes shall be apportioned among the several States." *Loughborough*, 18 U.S. at 322-325. Justice Brown explained the decision in *Loughborough* as follows:

> This District had been a part of the states of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government.

Downes, 182 U.S. at 260-61 (Brown, J.) (emphasis added).

In 1933, applying the theory espoused in *Downes*, the Supreme Court addressed the question of whether the federal judges in the District were entitled to Article III protection against reduction of their compensation. *O'Donoghue*, 289 U.S. 516. The *O'Donoghue* Court concluded that the inhabitants of the District of Columbia possess "the right to have their cases arising under the Constitution heard and determined" by a genuine Article III court. *Id.* at 540. The Court explained its decision as follows:

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, article 3. We think it is not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union.

Id.

From the foregoing, it is apparent that the cession transaction could not lawfully terminate or effectively waive the right of "persons" ceded, particularly the 1790-1800 voters, to voting representation in the House of Representatives. Nor could the cession preclude voting representation of the "persons to be" in the ceded area. The Constitution is no mere contract, subject to some kind of rule against perpetuities, between particular individuals and the national government. On the contrary, it is a covenant in perpetuity which makes the United States a fiduciary responsible for protecting for all time the rights created in and by the people who originated the Constitution for the benefit of themselves as their "Posterity." Constitution (Preamble). The people of the District of Columbia today are the

political "posterity" of the People in the District who had, and exercised, a constitutional right to vote in congressional elections from 1790 through 1800. Under established constitutional principles, neither the then-People of the District nor their Posterity forfeited that constitutional right when the District became the Seat of Government, and neither Maryland, nor the United States or its officers, had the constitutional authority to forfeit that right for them.

From another perspective**,** it is noteworthy that since 1820 when the *Loughborough* Court made its observation about voting by people in the District of Columbia, the voting landscape nationwide and in the District has changed dramatically, as has the District and its demographics. There is no evidence that the *Loughborough* court contemplated the time when that territory would be a body politic which was home for upwards of 500,000 people, equal to the population of at least three of the States. It is served by an elected executive authority in the form of a mayor, an elected council which was the functional equivalent of a unicameral legislature, as well as a well-tested set of qualifications and election apparatus for voting for council members, a non-voting delegate in Congress and presidential Electors. In considering the current weight to be accorded the *Loughborough* dictum, it is to be recalled that it was also Chief Justice Marshall who wrote:

> . . . [W]e must never forget that it's a constitution we are expounding.
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> . . .
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> [It was] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.

McCulloch v. Maryland, 17 U.S. 316, 407, 415 (1819) (Marshall, C.J.); *see also* Byron R. White, *Tribute to Honorable William J. Brennan, Jr.*, 100 Yale L.J. 1113, 1116 (1991) (Constitution is a

document cast in "majestic, open-ended clauses").

C

Given that the people living in the District from 1790-1800 had and exercised a constitutionally-protected right to vote for Congressional representation, and that that right was not, and could not have been, lost or waived in 1801 when the federal government assumed exclusive jurisdiction over the District, the question remains whether, under *Wesberry*, anything else necessitates defendants' continuing to deny or interfere with the right of their political posterity to vote for voting representation in the House of Representatives. Looking at the literal text of Article I and any necessary inferences therefrom, the 23rd amendment, nonvoting by citizens in the territories, and the lapse of time since the inhabitants of the District last voted in 1800, my answer is "nothing else."

1. Plain Language

The plain language of the Constitution does not necessitate denying the people of the District the right to voting representation in Congress. Neither the Seat of Government clause nor any other provision of Article I addresses, much less directly precludes, congressional representation for the people of the District. If the Framers intended to deny voting representation in Congress to the inhabitants of the Seat of Government, the Seat of Government clause was an appropriate place to say so. It does not.

The Framers and the drafters of the Bill of Rights knew how to say "no" directly. The original constitution said "no" twenty-seven times. *See, e.g.*, U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not . . . .) (emphasis added); *see also id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not . . . .") (emphasis added); *id.* art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .) (emphasis added).[33] Nowhere does the Seat of Government

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[33] Sections 9 and 10 of Article I are a catalogue of express prohibitions. *See, e.g.*, U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended . . . .") (emphasis added); *id*. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.") (emphasis added); *id.* art. I., § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . .") (emphasis added). Article III provides that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.* art. III, § 3, cl. 1 (emphasis added). Article IV specifies that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." *Id.* art. IV, § 3, cl. 1 (emphasis added). The Bill of Rights also says "no" repeatedly. *See, e.g.*, *Id.* amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .") (emphasis added); *id.* amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner . . . .") (emphasis added).

clause or any other provision of the Constitution expressly prohibit people in the District from voting for, and enjoying the service of, voting representatives in Congress.

2. Inferences from the use of the word "State"

The use of the word "State" in the various provisions of Article I concerning the election of members of the House of Representatives does not necessitate denying the people of the District the right to voting representation in Congress. The defendants maintain, in effect, that the use of the word "State" in these provisions creates a necessary inference that people not in a "State," therefore, people in the District of Columbia, cannot choose or be a Representative.[34] In essence, the defendants would apply the maxim *expressio unius est exclusio alterius* – the expression of one thing is the exclusion of another – as the basis for interpreting the term "State." The *expressio unius* maxim is "[a] non-binding rule of statutory interpretation, not a binding rule of law." *Martini v. Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1342 (D.C. Cir. 1999). As the Court of Appeals for the District of Columbia Circuit recently explained, in rejecting the application of the maxim to construe a statute,

> "[t]he maxim's force in particular situations" . . . "depends entirely on context, whether or not the draftsmen's mention of one thing . . . does really necessarily, or at least reasonably, imply the preclusion of alternatives." . . . That in turn depends on "whether, looking at the structure of the statute and perhaps its legislative history, one can be

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[34] The defendants rely on the following language in Article I: (1) that members of the House of Representatives are chosen by "the People of the several States"; (2) that the "Electors in each State shall have the Qualifications requisite for Electors in the most numerous Branch of the State Legislature"; (3) that Representatives are to be "apportioned among the several States"; (4) that a Representative must "be an Inhabitant of that State in which he shall be chosen"; and (5) that the "Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, §§ 2, 4; Memorandum on Behalf of Secretary Daley and the United States in Opposition to Plaintiffs' Motion for Summary Judgment and in Support [of] Their Motion To Dismiss Plaintiffs' Claims at 8-10 (filed Dec. 18, 1998) ("Sec'y Opp.").

> confident that a normal draftsman when he expressed 'the one thing' would have likely considered the alternatives that are arguably precluded."

Id. at 1343 (quoting *Shook v. District of Columbia Financial Responsibility and Management Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998)); *see also In re Sealed Case*, 181 F.3d 128, 132, (D.C. Cir. 1999) (en banc) ("The legal maxim expressio unius est exclusio alterius . . . is not always correct."). As the Supreme Court has explained, "The 'exclusio' is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice." *Ford v. United States*, 273 U.S. 593, 612 (1927) (internal quotations omitted); *see also* Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. Chi. L. Rev. 83, 91 (1997) ("The underlying difficulty is that the failure to list other things may reflect simple inadvertence, a failure to consider those other things, or an inability to reach a consensus . . . .").

The Supreme Court's decisions reflect its recognition of the limited utility of the maxim; it generally chooses to justify an interpretation that would be consistent with the maxim on other or additional grounds.[35] For example, in *Powell*, 395 U.S. 486, the House of Representatives adopted a

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[35] In this analysis of the role of the *exclusio unius* maxim to the circumstances of this case, I do not overlook the several occasions in which the Supreme Court, and the Framers themselves invoked or discussed the maxim. For example, Alexander Hamilton argued that the enumeration of certain cases over which the federal courts have jurisdiction, *see* U.S. Const. art. III, § 2, cl. 1, "marks the precise limits beyond which the federal courts cannot extend their jurisdiction," because "the specification would be nugatory if it did not exclude all ideas of more extensive authority." The Federalist No. 83, at 497 (Alexander Hamilton). He explained that "an affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended." *Id.* In *Marbury v. Madison*, Chief Justice Marshall echoed Hamilton's reasoning in concluding that Congress could not augment the original jurisdiction of the Supreme Court as described in Article III, § 2, clause 2. 5 U.S.

(continued...)

resolution excluding Adam Clayton Powell, Jr. from membership because it found that he had wrongfully diverted House funds and made false reports on expenditures of foreign currency. These facts framed an issue of whether Congress had the power to exclude an individual elected to the House of Representatives for any reason other than those set forth in the text of the Qualifications Clause of the Constitution.[36] The Court concluded that "the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote" because the qualifications for office expressed in the Constitution were intended to be exclusive, *i.e.*, no additional qualifications could be imposed by Congress. *Id.* at 548. Although such an interpretation is consistent with the application of

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[35] (...continued)
137, 174 (1803).

The Supreme Court has also treated the Constitution's enumeration of particular exceptions as barring the recognition of other exceptions. In *INS v. Chadha*, in considering the constitutionality of the legislative veto, the Court identified four "carefully delineated exceptions from presentment and bicameralism," which generally served as prerequisites for the exercise of legislative authority. 462 U.S. 919, 956 (1983). The Court concluded that the legislative veto was unconstitutional in part because the veto "was not within any of the express constitutional exceptions authorizing one House to act alone." *Id.*

None of the foregoing applications of negative inference necessitates the use of negative inference to read Article I as denying congressional representation to the people of the District. The provisions of Article I at issue here do not fall into the category of affirmative grants of specific powers such as were discussed by Hamilton in The Federalist No. 83 or at issue in *Marbury*; nor do they involve enumerated exceptions, as in *Chada*. Moreover, unlike the provisions construed in *Marbury* and *Chada*, the defendants' proposed interpretation of Article I is not necessary to avoid an "absurd" or "nugatory" meaning.

[36] With respect to the House of Representatives, the Constitution provides: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2.

the *expressio unius* maxim, the Court did not mention it. Instead, the Court pointed to the Framers' concern that a future Congress might fall into the error committed by Parliament in its 18th century harassment of its non-conformist member, John Wilkes. *Id.* at 527-31. With Wilkes' experience in mind, the *Powell* Court did not rest its interpretation of the Qualifications Clause on any maxim. Instead, it relied heavily upon the "relevant historical materials" and "the basic principles of our democratic system." *Id*. at 522, 548.

Similarly, in *Term Limits*, 514 U.S. 779, the Supreme Court concluded that the Qualifications Clause barred States from imposing term limits on members of Congress. Again, although its interpretation of the clause was consistent with the application of the *expressio unius* maxim,[37] the Court based its conclusion on "the text and structure of the Constitution, the relevant historical materials, and, most importantly, the 'basic principles of our democratic system.'" *Id.* at 806 (quoting *Powell*, 395 U.S. at 548).

In light of the interpretive principles articulated and applied by *Powell* and *Term Limits*, I believe that the issue before this Court should not be resolved simply by rote application of the

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[37] In reaching this conclusion, I do not overlook footnote 9 in the *Term Limits* majority opinion which acknowledges that the same result could be reached through application of the maxim. However, the majority was merely responding to the dissent's argument that the application of the maxim had no place in the analysis, rejecting the argument that "it had no merit." The majority's decision, however, clearly was not controlled by the maxim, as shown by the fact that its only mention appears in a footnote. Even Justice Story, whom the *Term Limits* court cites as supporting the application of the maxim in the interpretation of the Qualifications Clause, cautioned that this maxim was "susceptible of being applied, and indeed [is] often ingeniously applied, to the subversion of the text and the objects of the instrument." 1 Joseph Story, Commentaries on the Constitution § 448, at 342 (Melville M. Bigelow, 5th ed. 1905). In his view, therefore, "[t]he truth is, that, in order to ascertain how far an affirmative or negative provision excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects, and the scope of the instrument." *Id.* at 343.

expressio unius maxim. The question remains whether other considerations justify the negative inference from the use of the term "States" proposed by the defendants. An examination of the structure and purpose of Article I, the relevant historical materials, parallel constitutional provisions, and the basic principles of our democratic system, leads me to the conclusion that none do.

a. *Structure and Purpose of Article I*

There is nothing in the use of the word "States" in the provisions of Article I pertaining to the election of members of the House of Representatives that expressly precludes recognition of a right for the inhabitants of the District to vote for voting representation in Congress. More importantly, no policy purpose would be served by adopting such an interpretation. The primary purpose of the references to "States" in Article I is apparent when one considers that it was a priority of the Framers to set up a mechanism to create a national form of representative government. As Justice Kennedy observed in his concurring opinion in *Term Limits*: "the Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union." *Id.* at 840 (Kennedy, J., concurring) (emphasis added). In 1787, the 13 original States were the obvious and, actually, only political subdivisions capable together of conducting national elections. Chief Justice Marshall made the point in respect to the discrete role of States and the people in the process employed to ratify the original Constitution:

> It is true, [the people] assembled in their several states -- and where else should they have assembled? . . . [W]hen they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

McCulloch, 17 U.S. at 403 (emphasis added). It does not denigrate the "sovereignty" of States and

their other roles, internally and vis-a-vis the national government, to recognize the very significant use of their "identities and structures" in the national election process. *Term Limits*, 514 U.S. at 840. Nor does such use of them in that process necessarily impute to the Framers an intention to confer on the States anything other than an essentially ministerial role in that process. Nor does it necessarily imply an intention to exclude the people of the District from that process.

As the *Term Limits* Court further explained, "the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States." *Term Limits*, 514 U.S. at 803. With this goal in mind, the majority of the references to "States" in Article I can best be understood as specifying and using the most practical mechanisms available in the 18th century by which the people scattered among the several States could select their national representatives. *See also* The Federalist No. 61, at 372 (Alexander Hamilton) (referring to Article I as "the provisions respecting elections"). So understood, their employment in the circumstances that obtained in the late 18th century should not preclude employment by the people of the District of the election apparatus only available to them since the 1960's through which to regain representation in the House of Representatives enjoyed by their political forebears until 1801.

The requirement that a Representative be an inhabitant of the State which he or she represents, *see* U.S. Const. art. I, § 2, is the only reference to States in the context of choosing Representatives that is not related to using the States as a mechanism for selecting Representatives. It seems obvious, however, that the primary, if not sole, purpose of that requirement was to see to it that each Representative live among the people represented. It should be obvious that this requirement was not

aimed at denying the right of the people of the District to vote for voting representation in the House of Representatives. At most, it means that if the inhabitants of the District enjoyed representation by a member from the District, their Representative should reside there.

The Supreme Court's decisions in *Powell* and *Term Limits* do not undermine, indeed they tend to confirm, these interpretations. In both *Powell* and *Term Limits*, the Court was concerned with the question of whether additional qualifications beyond those expressly stated in the Qualifications Clauses of the Constitution could be imposed on a potential member of Congress. In both cases, the Court held that they could not, relying in large part on its understanding that the Framers' intent in adopting those clauses was to ensure that the opportunity to serve as a Member of the House of Representatives should be open to as many as possible. *Term Limits*, 514 U.S. at 794-95, 819; *Powell*, 395 U.S. at 547. The precise question here is not whether to impose additional qualifications, but rather how to interpret the meaning and scope of one of those qualifications. In an important sense, including the people of the District (whose political forebears were people of one of the several States) and representation for them in the House of Representatives in the apportionment process will serve a constitutional purpose honored by the *Powell* and *Term Limits* courts that "election to the National Legislature should be open to all people of merit." *Term Limits*, 514 U.S. at 819; *see also Powell*, 395 U.S. at 547.

b. *Historical Materials*

The relevant historical materials do not necessitate a conclusion that the Framers intended to deny to the inhabitants of the yet-to-be-selected Seat of Government the right to vote for voting representation in Congress through the use of the term "States" in Article I. On the contrary, the Framers had a clear purpose in creating a national Seat of Government subject to "exclusive legislation" by Congress and fully independent of any State, *see supra* Part I.B.1, a purpose not furthered by denying its inhabitants the right to vote for voting representation in the House of Representatives. Indeed, the only recorded discussions of, or references to, voting by the inhabitants of the District appear to have occurred after the Constitutional Convention, either during the ratification debates, at the time of the passage of the Organic Act in 1801, or in later Supreme Court opinions.

(i) Seat of Government Clause

It is undisputed that the Framers' primary, if not only, policy purpose with respect to the Seat of Government clause, was to create a specific Seat of Government, instead of a roving one, subject to the exclusive legislative power of Congress, and free from dependence upon, and the interference from, any State. *See supra* Part I.B.1. There is no showing that adopting the negative inference proposed by the defendants and, thereby, denying the inhabitants of the District the right to vote for voting representation in the House of Representatives would further that policy purpose,[38] or that the Framers

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[38] Indeed, the ultimate test might well be: would voting for representation in the House of Representatives interfere with the special authority of the federal government in respect to the federal enclave that is the Seat of Government. It seems obvious that a voting representative in the House of Representatives for District residents would no more "interfere[] with the jurisdiction asserted by the Federal Government," than did Kentucky's imposition of a license tax on residents of a federal enclave, (continued...)

thought that it would.[39]

(ii) James Madison

In The Federalist Number 43, in discussing the Seat of Government, James Madison wrote:

> as [the federal district] is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated.

The Federalist No. 43, at 272-73 (James Madison) (emphasis added). It has been suggested that the "plain meaning" of Madison's statement that the inhabitants of the District "will have had their voice" is that "only the first generation of District residents will have had a vote with respect to their destiny." Stephen J. Markman, Statehood for the District of Columbia 39 (1988). Markman explains:

> [Madison] speaks in the future perfect tense, "they will have had their voice." If he

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[38] (...continued)
approved by the Supreme Court in *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953).

[39] Indeed, in other instances where the Framers were particularly concerned about the influence of States, the denial of voting representation in Congress was never part of the solution. For example, to ensure the independence of Representatives and Senators, the Constitution provides that the National Treasury, not the States, pays their salaries. U.S. Const. art. I, § 6; *Term Limits*, 514 U.S. at 809-10. Similarly, to ensure the independence of Article III Justices and judges, Article III guarantees life tenure during good behavior, and proscribes diminution of judges' compensation while in office. *See* The Federalist No. 79 (Alexander Hamilton). If the Framers thought that denial of voting representation in Congress was necessary to assure independence from the States, they should have also denied it to Representatives, Senators and, particularly, Article III judges.

> meant that District residents would have a continuing voice in the national government, the proper language would have been "they will have their voice."

Id. However, a more plausible reading, context considered, is that Madison's statement is, at most, ambiguous on the question of District citizens' right to vote for voting representation in Congress.

Interpreting Madison's statement that the inhabitants of the Seat of Government "will have had their voice in the election of the government which is to exert authority over them" as a concession that those inhabitants would permanently lose their voice in congressional elections is in substantial tension with -- in fact, seems to contradict -- the natural reading of other contributions to The Federalist by Madison. A basic principle of Madison's conception of the House of Representatives was that, under the Constitution, the authority of the sitting Congress over the People derives from the most recent election and continues only until the next one. *See* The Federalist No. 52, at 330 (James Madison) ("the greater the power is, the shorter ought to be its duration"). Under Article I, the composition of the government which is to exercise authority over the District changes with each biennial federal election. If District inhabitants are unable to participate in the election of each new Congress, they have not "had a voice" in the election of their government merely because they <u>once</u> had a voice in the election of a predecessor government. Thus, Madison's statement is arguably consistent with the prospect that District inhabitants would have voted for the incumbent Congress or government and would expect to vote every two years thereafter for each of the successor Congresses or governments.

Moreover, Madison also stated that "<u>every imaginable objection</u> seems to be obviated." The Federalist No. 43, at 273 (emphasis added). It is difficult to reconcile that statement with an interpretation that inhabitants of the District would have only one last chance to elect representatives to

a single session of the House of Representatives, while new Congresses, elected every two years, would continue to exercise authority over them *ad infinitum*, without their being represented there. It is difficult to believe that Madison, his strong views about representative government and individual rights considered, could not imagine anyone objecting to such disenfranchisement. In point of fact, the District residents of the area ceded by Madison's very own Virginia objected so vigorously and so long to their lack of voting representation in Congress that they ultimately persuaded Congress to cede that area back to Virginia. *See supra* note 23. Indeed, Madison's conclusion that every objection would be obviated followed his statement that "the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting [the federal district]." Madison might well have been assuming that the Constitution required the ceding State to provide for the protection of the certain rights, including the right to vote for voting representation in the House of Representatives, if not by the ceding State, then by the United States as a state-imposed condition of the cession. Of course, Maryland did no such thing, further reducing the precedential force Madison's ambiguous observation.

The substantive problems flowing from interpreting Madison as recognizing that the inhabitants of the District would be denied their right to vote for voting representation in Congress are far more troubling than any purported grammatical awkwardness which may result from a contrary interpretation. Therefore, I conclude that Madison's statement does not necessitate a conclusion that the Framers intended to deny the people of the District the right to vote for voting representation in the House of Representatives or that the references to "States" should be interpreted to have that effect.

(iii) Alexander Hamilton

Alexander Hamilton, a vigorous proponent of the Constitution, unsuccessfully offered the

following amendment during the New York ratifying convention:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes amount to ____ such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body.

5 The Papers of Alexander Hamilton 189-90 (Harold C. Syrett & Jacob E. Cooke eds., 1962). Although the amendment, had it been ratified, would have ensured District inhabitants the future right to vote for voting representation in Congress, it does not follow that its failure of adoption necessitates denial of that right.

So far as I have been able to determine from the parties' submissions and other research, neither the records of the New York convention nor Hamilton's papers reveal any remarks by Hamilton explaining his proposal. *See* Papers of Alexander Hamilton. One possible interpretation is that the amendment was designed to provide a formula for District representation because Article I would require such representation for the District once it was created. Another is that is that Hamilton believed that, absent his amendment, the District would remain part of the ceding State to the extent that its residents would vote through that State's apparatus. Also, Hamilton's proposal is consistent with the possibility that Hamilton believed that an amendment to the Constitution would be required to allow the people of the residents of the District to vote. Given the number of alternative explanations of this amendment, all of which are speculative, I would conclude that the mere existence of this proposed amendment is not significant evidence that the Framers intended to deny the people of the District the right to vote for voting representation in Congress or that the references to "States" were intended to have that effect.

(iv) Thomas Tredwell

Thomas Tredwell argued in the New York ratifying convention that inhabitants of the proposed Seat of Government would not and should not be able to participate in congressional elections:

> The plan of the federal city, sir, departs from every principal of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world.

2 Elliot's Debates at 402, *reprinted in* 3 Kurland and Lerner, *supra* note 12, at 225 (emphasis added). However, Tredwell opposed not only the Seat of Government clause, but the entire Constitution. As such an opponent, his characterization of the Constitution's effect on District inhabitants is "entitled to little weight." *Ernst & Ernst v. Hochfeller*, 425 U.S. 185, 203 n.24 (1976) ("Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight. This is especially so with regard to the statements of legislative opponents who in their zeal to defeat a bill understandably tend to overstate its reach.") (internal citations, ellipsis and quotation marks omitted); William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but not Statutory Legislative History?*, 66 Geo. Wash. L. Rev. 1301, 13__ (1998) ("[Opponents'] strategic statements are worth little in understanding the provision if it is adopted, because their incentives are to exaggerate and distort the meaning and effect of the provision."). Accordingly, Tredwell's statements shed little, if any, light on the Framers' intent with respect to the voting rights of the inhabitants of the District or the interpretation of the references to "States" in Article I.

(v) Organic Act

There were statements made at the time of the enactment of the Organic Act in 1801 which assume that its enactment would have the effect of terminating the right of inhabitants of the District to vote for voting representation in the House of Representatives.[40] I do not consider those statements to be persuasive evidence that the Framers' of the Constitution intended such a outcome to result from their use of the term "States" or from the language of any other provision in the Constitution. The Organic Act debates occurred over fourteen years after the Constitutional Convention and over ten years after the First Congress selected the location of the Seat of Government. The views of individual participants in those debates, even if they could be attributed to the Sixth Congress as a whole, would be an unreliable indication of the understanding of the Founders during the time before the location of the Seat of Government had been determined. Defendants do not suggest that those who made the statements participated in the Convention or were "au courant" in 1787. Moreover, given the modest size of the District's population in 1801, the drafters of the Organic Act might well have assumed, without knowing, that the Framers had simply not considered providing affirmatively, yet not affirmatively precluding, for the District's relatively few inhabitants. A member of Congress and two Senators representing 8,000 souls could have very awkward and disruptive of the power balance. Had populous New York or Philadelphia been chosen as the permanent Seat of Government, however – certainly a possibility in 1787, *see supra* Part I.B.1, – it seems unlikely that 1801 Congressmen would have seen the denial of voting representation for the District's population as the Framers' manifest design. These facts make it, in my view, unreasonable to assume that the views expressed at the time

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40 *See* Maj. Op. at notes 29, 30, 32, 34 and accompanying text.

of the adoption of the Organic Act reliably reflect any decision by the Framers, which were have necessarily been formed without knowing whether the site of the Seat of Government would be New York, Philadelphia, or some other place, urban or rural.

(vi) *Loughborough*

Finally, there is Chief Justice Marshall's 1820 statement in *Loughborough* that the inhabitants of the District were "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." 18 U.S. at 324. Defendants rely very heavily upon the *Loughborough* statement because, among other things, Chief Justice Marshall was present at the creation. As Justice Jackson put it so elegantly, the Chief Justice "wrote from close personal knowledge of the Founders and the foundation of our constitutional structure . . . ." *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 586-87 (1949). But the *Loughborough* dictum does not necessarily support defendants' persistent contention that the Constitution *ab initio* precluded voting representation in Congress for inhabitants of the Seat of Government, wherever it might ultimately be. Rather the *Loughborough* dictum can better be read to mean what it says and clearly implies: Chief Justice Marshall believed that some time after the Constitution was ratified, the "part of the society" constituting inhabitants of the District "voluntarily relinquished" voting rights that they had previously enjoyed, including specifically, apportioned rights to representation in the House of Representatives. However, the *Loughborough* dictum cannot be reconciled with the present understanding of the nature of constitutional rights – including rights under the original Constitution. The parties have not cited (and my research has not disclosed) any documentary evidence that inhabitants of the District ever actually waived their voting rights individually

or collectively, either before cession or after it. Finally, as previously discussed, the concept of relinquishment "by constructive consent is not a doctrine commonly associated with surrender of constitutional rights." *College Savings Bank*, 119 S. Ct. at 2229 (quoting Edelman, 415 U.S. at 673); *Lucas*, 377 U.S. at 736; *see supra* Part II.B. Accordingly, this dictum does not necessitate a conclusion that by using the word "States" in Article I or in drafting any other provisions of the Constitution in 1787 the Framers intended to deny to the inhabitants of the yet-to-be-selected Seat of Government the right to vote for voting representation in the House of Representatives.

c. Parallel Constitutional Provisions

The use of the term "State" in parallel provisions of the Constitution does not necessitate or justify the negative inference proposed by the defendants. To the contrary, as Supreme Court decisions make clear, the term "State" is not necessarily interpreted as meaning "and not the District of Columbia."

The defendants rely heavily on the Supreme Court's decision in *Hepburn & Dundas v. Ellzey*, 6 U.S. 445 (1805). In *Hepburn*, the Supreme Court considered whether citizens of the District could bring suits in federal court. Section 11 of the Judiciary Act of 1789 gave federal courts jurisdiction to hear cases where "the suit is between the citizen of the State where the suit is brought, and a citizen of another State." 1 Stat. 73, 78. The Court looked to Article III of the Constitution, which confers power on the federal courts to hear suits "between Citizens of different States," to answer the question of whether the reference to "States" in the statute included the District. The *Hepburn* Court concluded that the reference to "States" in the Constitution, and therefore in the statute, did not include the District. *Id.* at 452-53. However, it did not consider whether the reference to States in Article III precluded

jurisdiction over suits between citizens of the District and citizens of a State.

In 1948, Congress enacted a statute that treated the District as a State so that its residents could maintain diversity suits in federal courts. 62 Stat. 869 (codified at 28 U.S.C. § 1332(d)). In 1949, the Supreme Court upheld that statute as an appropriate exercise of Congress' power under the District Clause, even though Article III, § 2, clause 1, only refers to cases "between Citizens of different States." *Tidewater*, 337 U.S. 582. There is no majority opinion. However, the *Tidewater* holding confirms what is now the law: the Constitution does not bar Congress from conferring federal diversity jurisdiction in cases brought by a District resident even though that individual is not literally a citizen of a "State." Accordingly, the use of the term "State" in the diversity jurisdiction clause of the Constitution cannot mean "and not of the District of Columbia."

Similarly, the Supreme Court has held that the Full Faith and Credit clause in Article IV of the Constitution, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," U.S. Const. art. IV, § 2, binds the courts of the District equally with the courts of the States. *Loughran v. Loughran*, 292 U.S. 216, 228 (1934).

Further, if the references to "States" in Article I, § 2, necessarily exclude the people of the District, then the reference to "Citizens of each State" in Article IV, § 2, clause 1, would prohibit the enjoyment of an enforceable right to travel by District citizens. Article IV, § 2, clause 1, guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States" (emphasis added). This provision of the Constitution protects a fundamental component of the right to travel, "the right of a citizen of one State . . . to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz v. Roe*, 119 S. Ct. 1518, 1525

(1999). The privileges and immunities clause of Article IV "provides important protections for nonresidents who enter a State whether to obtain employment, to procure medical services, or even to engage in commercial shrimp fishing." *Id.* at 1526 (internal citations omitted). It defies common sense to suppose that the clause implicitly requires the denial of an enforceable right to travel to citizens of the District, leaving treatment of District citizens to the exclusive discretion of each State they visit. It is only slightly less implausible to imagine that the Framers meant to leave District citizens' right to travel dependent upon the legislative grace of Congress. In any event, the implausibility of these two interpretations of the Article IV privileges and immunities clause -- that it prohibits a right to travel for District citizens, or that it neither prohibits nor guarantees such a right -- suggests that neither interpretation follows simply from the application of common sense to the plain language of the clause.

Accordingly, the interpretations of the term “State” in other provisions of the Constitution support a conclusion that the references to "States" in Article I do not necessarily imply "and not the District of Columbia."

d. Democratic principles

As reiterated by the Supreme Court in *Term Limits* and *Powell*, interpretation of the Constitution, particularly Article I, should be guided by the fundamental democratic principles upon which this nation was founded. *Powell*, 395 U.S. at 547; *Term Limits*, 514 U.S. at 819-823. Absent any persuasive evidence that the Framers' intent in using the term "State" was to deny the inhabitants of the District the right to vote for voting representation in the House of Representatives, a consideration of fundamental democratic principles further supports the conclusion that the use of that term does not necessitate that result.

A republican, that is representative, form of government, is a keystone in the Constitution's structure, a keystone hewn directly from the Declaration of Independence; the denial of representation was one of the provocations that generated the Declaration and the War that implemented it.[41] Article I creates the republican form of the national government; Article IV guarantees that form to each state and its people.

Recent Supreme Court analysis confirms the continuing vitality of these principles. As Justice Kennedy, writing for the Court, aptly described it:

> By splitting the atom of sovereignty, the founders established two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

Alden v. Maine, 119 S. Ct. 2240, 2265 (1999) (internal quotations omitted). Thus, the people of

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[41] For example, the Declaration stated that the King: "has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only." The Declaration of Independence ¶ 5 (U.S. 1776).

each state are sovereign in that state; the people of the Nation are sovereign vis-a-vis the national government. As the Supreme Court has explained:

> [R]epresentatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states. . . . Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people."

Term Limits, 514 U.S. at 803 (quoting 1 Story § 627). The Court emphasized that "the right to choose representatives belongs not to the States, but to the people. . . . Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the States, but by the people." *Term Limits*, 514 U.S. at 820-21 (emphasis added). The Court found the principle firmly grounded in Chief Justice Marshall's oft-cited observation that

> [t]he government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

Id. (quoting *McCulloch*, 17 U.S. at 404-05).

Reciprocally, the authority of the national government operates directly upon the people, as distinguished from the states themselves.

> [T]he constitutional design secures the founding generation's rejection of the concept of a central government that would act upon and through the States in favor of a system in which the State and Federal Governments would exercise concurrent authority over the people – who were, in Hamilton's words, "the only proper objects of government."

Alden, 119 S. Ct. at 2247 (quoting The Federalist No. 15, at 109) (Alexander Hamilton) (other internal quotations omitted); *Term Limits*, 514 U.S. at 803 ("In adopting [the Constitution], the

Framers envisioned a uniform national system, rejecting the notion that the Nation was merely a collection of States, and instead creating a direct link between the National Government and the people of the United States."); *New York v. United States*, 505 U.S. 144, 166 (1992) ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.").

The importance of voting by the people in a representative democracy, such as the Constitution established, is so obvious that it is difficult to articulate its provenance. Yet, there is no dispute that voting by the people and the existence of a representative democracy are inextricably linked. One simply cannot exist without the other. As the Supreme Court has repeatedly recognized, following the words of Alexander Hamilton, it is a "fundamental principle of our representative democracy . . . that 'the people should choose whom they please to govern them.'" *Term Limits*, 514 U.S. at 795 (quoting *Powell*, 395 U.S. at 547 (quoting 2 Elliot's Debates 257)). As the *Reynolds* Court observed, "the right of suffrage is a fundamental matter in a free and democratic society" and "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." 377 U.S. at 555, 561.

Thus, the very structure of the national government, subjected by the Constitution to the ultimate sovereignty of the people, strongly negates the argument that either the Article I references to "States," or the absence of any mention of voting for the people of the District in the District Clause, necessarily precludes voting by and representation of the people of the District. Accordingly, the democratic principles reflected in the structure of the government created pursuant to the Constitution weigh decisively against the negative inference proposed by the defendants – an inference that would

result in the denial of the right to vote for voting representation in the legislature with exclusive authority over the District.

For all of the above reasons, the literal references to the "States" in Article I do not necessitate denying to the people of the District the right to vote for voting representation in the House of Representatives.

3. Twenty-Third Amendment

Defendants also argue that the adoption of the Twenty-third Amendment, giving the people of the District to right to choose electors to participate in the elections of the President and Vice-President, necessarily means that a similar constitutional amendment would be required to provide the inhabitants of the District with the right to vote for voting representation in the House of Representatives. First, the defendants maintain the adoption of the amendment "confirm[s] the understanding and intent of both Congress and the people of the ratifying States that the District of Columbia is not otherwise a 'State' for purposes of federal elections except as provided for by this Amendment." Sec'y Opp. at 12-13; *see also* Memorandum of Points and Authorities in Support of the Motion to Dismiss of Defendants Robin H. Carle, Wilson Livingood and James M. Eagen III, and Opposition to Plaintiffs' Motion for Summary Judgment in *Alexander, et al. v. Daley, et al.* at 23-24 (filed Dec. 18, 1998) ("House Officers Opp."). However, the suggestion that the understanding of the people adopting a constitutional amendment in 1961 could confirm the 1787 understanding of the Framers of the Constitution appears to have no precedent in constitutional interpretation.

Next, the defendants point to the legislative history of the amendment which includes the statement that it "would not authorize the District to have representation in the Senate or the House of

Representatives." H. Rep. No. 86-1698, at 2-3, *reprinted in* 1960 U.S.C.C.A.N. 1459, 1462. Of course, no one is suggesting that the Twenty-third Amendment authorizes such representation.

Finally, the defendants argue plaintiffs' position must be rejected because "if plaintiffs' argument were correct, the 23rd Amendment would have been unnecessary." House Officers Opp. at 24. The defendants invoke Chief Justice Marshall's statement in *Marbury v. Madison* that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it." 5 U.S. 137, 174 (1803). First, there is only a presumption, and not a rigid rule, against interpretations that yield superfluous constitutional provisions. For example, the Supreme Court has noted that Article I, section 8, clause 14, of the Constitution, which spells out Congress' power "[t]o make Rules for the Government and Regulation of the land and naval Forces," is "technically superfluous," *United States v. Stanley*, 483 U.S. 669, 682 (1987), in light of Article I, section 8, clause 18 -- the Necessary and Proper Clause. *See also* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 Val. U. L. Rev. 1 (1998); Sanford Levinson, *Accounting for Constitutional Change*, 8 Const. Commentary 409, 422-28 (1991). Second, the application of the presumption can, at best, only illuminate the meaning of the Twenty-third Amendment, not provisions of the original Constitution, such as Article I. The logic of the presumption is that the drafters of a document are unlikely to have included redundancies, but, of course, the drafters of Article I did not include the Twenty-third Amendment. In light of these considerations, the adoption of the 23rd amendment should not be relied upon in interpreting the original constitutional provisions at issue here. For the same reasons, the proposed, but never adopted, amendments pertaining to voting

by District inhabitants shed no light on the issues before us.[42]

4. Territories

Two circuits have concluded that residents of the Territories have no right to participate in the election of the President or Vice President. *See Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (per curiam), *cert denied*, 514 U.S. 1049 (1995); *Attorney General of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985). Assuming, *arguendo*, that citizens of territories also lack the right to vote in Congressional elections, that would not necessitate denying the people of the District the right to vote for voting representation in the House of Representatives. No territory or its inhabitants were ever part of the "several States"; nor did the inhabitants of our territories ever vote for representation in the House. Nor were the people in the territories, or their forbears, ever ceded there. In contrast, the inhabitants of the District today are the political posterity of the original people of the District, who were, until ceded to the United States, "people of the several States" who voted in federal elections until 1801. Citizens of the territories cannot claim a similar provenance. The foregoing considered, it simply does not follow that because

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[42] In 1978, Congress approved and submitted to the states for ratification an amendment to the Constitution providing that "for purposes of representation in Congress . . . the District . . . shall be treated as though it were a State." H.R.J. Res. 554, 95th Cong., 2d Sess. (1978). Only sixteen states approved it. *D.C. Vote Amendment Dies*, Cong. Q. 404, 404-05 (1985 Almanac). History records that, over the years between 1801 and 1978, Congress entertained up to 150 resolutions to amend the Constitution "to provide the District with some measure of voting to enfranchise District residents." *District of Columbia Representation in Congress: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., at 353-54 (1978) (Issue Brief, Congressional Research Service). After the failure of the 1978 amendment, a principal sponsor observed: "We all know what's going on here. Opponents of statehood have felt in the past that the District of Columbia is too urban, too liberal, too Democratic, too black." 124 Cong Rec. 26345 (1978) (statement of Sen. Kennedy).

people of the territories have never been entitled to voting representation in Congress that the people of the District must necessarily be denied renewal of their right to vote for voting representation in the House of Representatives.

5. Lapse of Time

The mere fact that nonvoting by the people of the District has been a continuous and unbroken practice since 1801 does not necessitate denying the people of the District today the right to vote for voting representation in the House of Representatives.[43] The Supreme Court has never hesitated to recognize constitutional rights, no matter when recognition is sought and no matter how long practices to the contrary have continued. Not so long ago, the Court observed, "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Powell*, 395 U.S. at 546-47; *cf. Puerto Rico v. Branstad*, 483 U.S. 219, 229 (1987) ("Long continuation of decisional law or administrative practice incompatible with the Constitution's requirements cannot overcome this Court's responsibility to enforce those requirements.").

The Supreme Court has a long history of recognizing previously unrecognized constitutional rights. For example, its landmark decision in 1954 that racial segregation of public school students violated the Fourteenth Amendment, *see Brown v. Board of Education*, 347 U.S. 483 (1954), reversed its 1896 decision that "separate, but equal" was all the equal protection clause required, *see Plessy v. Ferguson*, 163 U.S. 537 (1896). In 1964, the Court adopted the one-person, one-vote maxim as the standard for state legislative apportionment, *Reynolds*, 377 U.S. at 568, even though, as

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[43] From the perspective of an 80 year old, 200 years is not all that long a time.

Justice Frankfurter had pointed out in an earlier dissent in "[t]he notion that representation proportioned to the geographic spread of population," had "never been generally practiced, today or in the past," *Baker v. Carr*, 369 U.S. 186, 301 (Frankfurter, J., dissenting). In 1986, the Court held that racially-based peremptory challenges violated the equal protection clause, *see Batson v. Kentucky*, 476 U.S. 79, 100 (1986), reversing its 1965 decision holding that peremptory challenges were immune from equal protection scrutiny largely because such scrutiny "would entail a radical change in the nature and operation of the challenge," *Swain v. Alabama*, 380 U.S. 202, 221-22 (1965). In *Roe v. Wade*, 410 U.S. 113 (1973), the Court held that the right to privacy encompassed a woman's right to seek an abortion, even though abortion had long been treated as a crime in many states. Poll taxes, grandfather clauses, and white primaries were once commonplace; all are now unconstitutional. *See Harper*, 383 U.S. 663; *Guinn v. United States*, 238 U.S. 347 (1915); *Smith v. Allwright*, 321 U.S. 649 (1944). Just this past year, the Supreme Court severely curtailed Congress' power to abrogate States' sovereign immunity, despite years of permitting it virtually free rein in that area. *Alden*, 119 S. Ct. 2240. And, of course, the literal application of the Bill of Rights to the States was not recognized until many years after adoption of the Fourteenth Amendment, and then only by a gradual process. *Compare, e.g., Adamson v. California*, 332 U.S. 46 (1947) *with Malloy v. Hogan*, 378 U.S. 1, 4-6 (1964) *and Gideon v. Wainwright*, 372 U.S. 335, 341-345 (1963).

For years, many voter apportionment issues never reached the courts because it was accepted doctrine that the apportionment of legislative districts involved a political question beyond the reach of the judiciary. *See, e.g., Colegrove v. Green*, 328 U.S. 549 (1946). It was not until the Court's 1962 decision in *Baker*, 369 U.S. 186, overruling *Colegrove*, that the courts began to address many long-

suffered voting rights deprivations. Thus, as a practical matter, until *Baker v. Carr*, a suit like the plaintiffs would have been an exercise in futility.

III

EQUAL PROTECTION

The *Wesberry* Court notably limited to Article I its analysis of "one person, one vote" in congressional elections, putting aside any consideration of other constitutional provisions as sources of the right to vote. *Wesberry*, 376 U.S. at 9 n.10. The principle of *Wesberry*, standing alone, requires that the people of the District, the political posterity of the pre-1801 voters, who were "people of the Several States," be given the opportunity to vote for a Member of the House of Representatives. Even if *Wesberry* itself did not mandate this conclusion, the plaintiffs argue, and I am persuaded, that the Equal Protection Clause of the Fourteenth Amendment, made applicable to the United States and its officers by the Fifth Amendment, provides a strong additional ground for a declaration that the inhabitants of the District have a constitutional right to vote for voting representation in the House of Representatives and that the failure of the Secretary to include inhabitants of the District in the apportionment violates equal protection principles. Accordingly, the Secretary has a constitutional duty to include the people of the District in any future apportionment and to calculate and report to the President the representation commensurate with such apportionment.

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Supreme Court has held that the principles embodied in this clause apply equally to the federal government, for the benefit of persons residing in the District of Columbia, by virtue of the due process

clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that the principles embodied by the equal protection clause of the Fourteenth Amendment that prohibited States from maintaining racially segregated schools were applicable in the District of Columbia by virtue of the Fifth Amendment due process clause); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (noting that "[t]his Court's approach to the Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217-18 (1995) (confirming continued vitality of *Weinberger*).

Basic equal protection principles require government, state and national, to treat similarly situated persons equally, particularly with respect to constitutionally-based rights and privileges. *See, e.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982). The equal protection clause embodies a three-tiered system of review. Generally, the classification at issue is subject to "ordinary scrutiny." Under this test, the classification satisfies the requirements of equal protection as long as it is rationally related to a legitimate government end. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Plyler*, 457 U.S. at 217-18. At the other end of the spectrum are racial classifications and other governmental actions that impact on fundamental rights. These are subject to "strict scrutiny"; the government must demonstrate a compelling interest, and the classification must be narrowly tailored to meet that end. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990); *Plyler*, 457 U.S. at 217. In the middle are classifications involving, for example, gender, which are subject to "intermediate scrutiny" -- the end

must be important, the means substantially related to the end. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976). Application of any of these tests to continued denial of the right of District inhabitants to vote for voting representation in the House of Representatives should yield the same result: the equal protection clause entitles them to such representation because the United States has no interest, compelling or otherwise, in denial of it.

With respect to voting, the Supreme Court has held that the right to cast votes of equal weight in the selection of representatives to a legislature is a fundamental right whose denial must be subject to the strictest scrutiny. *See Reynolds*, 377 U.S. at 562 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) ("[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." (internal quotation marks omitted)); *Harper*, 383 U.S. at 665 ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). As the Court explained in *Reynolds v. Sims*, in invalidating malapportioned state legislative districts:

> Diluting the weight of votes because of <u>place of residence</u> impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.

377 U.S. at 565 (internal citations omitted) (emphasis added).

The people of the District of Columbia are citizens of the United States, are subject to the laws passed by the Congress of the United States, and are the political posterity of the residents of the area

which became the District in 1801, who voted for Congressional representation from 1790 until ceded to the United States in 1800. The population of the District has always been included in the decennial census. Yet, for the purpose of allocating seats in the House of Representatives, it is the practice and intention of the Secretary to exclude the District and the people there. Thus, the federal government treats the people of the District of Columbia differently from people residing in States, who are apportioned seats in the House of Representatives. In addition, the people of the District are treated differently from people residing in federal enclaves, over which Congress holds the same constitutional power of "exclusive legislation" that it holds over the people of the District. U.S. Const. art. I, § 8. Yet, the inhabitants of enclaves are included in apportionment and vote in Congressional elections in the state within which the federal enclave exists. *Evans v. Cornman*, 398 U.S. 419, 426 (1970) (people of enclave are also people of state surrounding enclave). The people of the District have no such apportionment or vote. Finally, the people of the District are treated differently from United States citizens who reside overseas, who, by virtue of the Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. 99-410, 100 Stat. 924 (1986) (codified at 42 U.S.C. § 1973ff et seq.) (Overseas Voting Act), vote in Congressional elections in the state where they most recently lived.

None of the defendants disputes the fundamental nature of the right to vote, or that, generally, classifications, including classifications according to place of residence, impacting on that right must be subject to strict scrutiny. Nor do they contend that the federal government has a compelling interest that could justify depriving the people of the District of their right to vote for congressional representation. For the most part, the defendants argue, on several different grounds, that principles of equal protection simply do not apply. The closest they come to addressing the equal protection issue

head on is to argue that if the plaintiffs' equal protection claim is accepted, then felons, minors and residents of territories must also be enfranchised. *See* House Officers' Reply to *Alexander* Plaintiffs' Consolidated Memorandum in Opposition to Defendants' Motions To Dismiss, and Reply in Support of Ps' Motion for Summary Judgment at 19 (filed Mar. 10, 1999) ("House Officers' Reply"). I will address each argument in turn. I find none persuasive.

First, the defendants argue that for equal protection to apply, the plaintiffs must have a preexisting constitutional right to vote. As Article I cannot be the source of that right, in their view, there is no cognizable equal protection claim. *See* Reply Memorandum of Secretary Daley and the United States in Support of Their Motion to Dismiss the Claims Brought by the *Alexander* Plaintiffs at 9-10 (filed Mar. 8, 1999). As I disagree with the defendants' premise that the people of the District do not have a preexisting constitutional right to vote, I see no merit in this argument. As previously explained in detail, the people of the District are the political posterity of the people who lived in the District between 1790 and 1800. Those people had and exercised a constitutional right to vote for Congressional representation. Neither cession or any other event in the intervening years could have constitutionally taken away that right. Nor is the denial of that right mandated by the Constitution or reasonable negative inferences from it. Accordingly, the people of the District have a constitutional right to vote, albeit one that has been dormant since 1800; continued denial of that right where there is no compelling governmental interest violates equal protection principles.

Next, the defendants argue that the equal protection claims are invalid on their face because any statutory restriction on the plaintiffs' right to vote is merely reflective of the Constitution itself. If the Constitution precludes voting by DC, they argue, then there is no "constitutional" challenge that can be

made to change that result. Secy' Opp. at 17. Again, as I disagree with the defendants' premise that the Constitution itself bars voting by the people of the District, *see supra* Part II, I see no merit in this argument either.

The defendants also argue that the equal protection clause does not apply because "plaintiffs have not challenged any classification actually drawn by Congress." House Officers' Opp. at 28. The plaintiffs respond that they are challenging "statutes and House and Senate rules – and [] the conduct of defendants in enforcing those statutes and rules." Alexander Plaintiffs Consolidated Memorandum in Opposition to Defendants' Motions to Dismiss, and Reply in Support of Plaintiffs' Motion for Summary Judgment at 4 (filed Feb. 8, 1999). The essence of the plaintiffs' case, however, is a challenge to the apportionment statute, as applied by the Secretary, which is properly subject to equal protection scrutiny. *Cf. Reynolds*, 377 U.S. at 568 (sustaining equal protection challenge to state apportionment scheme).

In addition, the defendants argue that equal protection principles cannot be applied because the people of the District are not "similarly situated" with respect to citizens of States, residents in federal enclaves, or overseas voters. The people of the District cannot be compared to citizens of States, they argue, because the Constitution itself, in Article I, Amendment XVII, and Amendment XIV, § 2, distinguishes between the two. *See* House Officers' Opp. at 28-29. Even assuming *arguendo* that the defendants are correct in stating that the Constitution "distinguishes" between the citizens of the District and citizens of States, that does not resolve the issue. As discussed *supra*, there is nothing in the Constitution itself, or necessarily implied from it, that requires denying voting representation in Congress

to the people of the District.[44] Moreover, the people of the District and citizens of States are similarly situated in that citizens of the States and the posterity of the pre-1801 District inhabitants are subject to the laws of the United States and, before the cession, both were inhabitants "of the several states." Accordingly, the two groups are "similarly situated" for equal protection purposes.

With respect to enclaves, the defendants argue that enclaves are significantly different from the District because residents of an enclave remain citizens of the State, enclaves do not change state boundaries, and states continue to exercise jurisdiction over enclaves. House Officers' Opp. at 29-30. However, the same clause of the Constitution authorizes the establishment of the District and federal enclaves and provides that Congress shall have the same power to exercise exclusive jurisdiction in each case. The people living in the areas that became the District, just as the people living in the areas that have become federal enclaves, had a constitutional right to vote for representation in Congress. The Supreme Court has held, in *Evans v. Cornman*, 398 U.S. at 426, that residents of federal enclaves retain that right. The people of the District have the same interest as the people in federal enclaves, if not a greater interest, in having a voice in Congress, their ultimate legislature. At one time, when a presidentially-appointed three-person Board of Commissioners constituted the local legislative and executive authority in the District of Columbia (subject, of course, to Congress' exclusive

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[44] It is noteworthy that the *Loughborough* Court approved direct taxation of District residents despite the fact that the tax apportionment requirement of Article I, like its voting apportionment requirement, referred only to apportionment among the several States. U.S. Const. art. I, § 2. The Court found that the negative inference, here invoked by defendants with respect to voting apportionment, was trumped by another provision of the Constitution: the taxing power vested in Congress by Article I. *Loughborough*, 18 U.S. at 322-23. So here, any such negative inference is trumped by other provisions of the Constitution, adopted in the wake of the Civil War and imported thereafter into the original Due Process clause of the Fifth Amendment: the Equal Protection clause.

legislation) there may have been a material difference between the political status of enclave people and the people of the District. However, since 1973, when Congress created a local government consisting of an elected mayor and an elected council with legislative authority (subject, of course, to Congress' exclusive legislation), and the equivalent of a state court system, the functional differences between the political status of District people and that of enclave people is more theoretical than real. Congress' exclusive legislative authority is ultimate. It can preempt any ordinance of the District Council and, it seems obvious, could also pre-empt any state law which purported to bind the people of any federal enclave in any state.

Defendants make much of the difference between Congress' exercise of its power of "exclusive legislation" with respect to the District and its exercise of its identical power with respect to the enclaves. They concede the obvious – that Congress' power with respect to the enclaves and with respect to the District is identical.[45] They disregard, however, the extent to which Congress' relaxation of its latent power with respect to the District parallels the relaxation with respect to the enclaves. Just as Congress has passed statutes permitting States to exercise their own authority in federal enclaves, so it has passed statutes permitting the District government to exercise its own authority within its enclave. For example, in federal enclaves, state criminal laws apply to "acts not punishable by any enactment of Congress," 18 U.S.C. § 13, states are permitted to levy and collect income, gasoline, sales and use taxes, 4 U.S.C. §§ 104-110, and state unemployment laws and workers' compensation laws apply, 26

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[45] For example, the National Institutes of Health became a federal enclave in 1953 when Maryland ceded jurisdiction over the property to the United States. *Evans*, 398 U.S. at 420-21 (citing Md. Code Ann. art. 96, § 34).

U.S.C. § 3305; 40 U.S.C. § 290. Moreover, at least at the National Institutes of Health (NIH), the federal enclave whose status was at issue in the *Evans* case, residents register their cars in Maryland, obtain drivers' permits and license plates from Maryland, are subject to the process and jurisdiction of the Maryland state courts, and send their children to Maryland public schools. *Evans*, 398 U.S. at 424. Similarly, the District, not the federal government, exercises direct, hands-on authority over motor vehicle registration and has its own school system. The District also has its own court system, completely independent of the federal courts, except that, like state courts, the decisions of its highest court are reviewable by the Supreme Court. District residents pay income, sales and other taxes to the District. In view of the foregoing, to distinguish the right of District residents to the same protection of the laws from that enjoyed by enclave residents is to belabor a distinction without a material difference. Accordingly, the apportionment statute, as applied by the Secretary, deprives the people of the District of equal protection of the laws because for apportionment it includes the census population of federal enclaves in the population of the state within which the enclave exists while excluding the census population of the District from the apportionment process.

The Overseas Voting Act, requires a State to "permit overseas voters" to participate (by absentee ballot) in "in general elections for Federal office." 42 U.S.C. § 1973ff-1(3). An "overseas voter" includes "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." *Id.* § 1973ff-6(5)(C). The Act does not require States to permit overseas voters to vote in local or state elections. Nor does an overseas voter under the Act need to be a citizen of the State where

voting occurs.[46] As a result, an overseas voter, despite the language of Article I, may vote in federal elections without having "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1.

The defendants argue that inhabitants of the District and overseas voters are not similarly situated for equal protection purposes because Congress has authorized voting by overseas voters. *See* House Officers' Opp. at 27.[47] However, the critical fact for equal protection analysis is not that there is a statute giving overseas voters their voting rights, but that this Act permits voting in federal elections by persons who are not citizens of any State nor qualified under the literal terms of Article I to vote in federal elections,[48] while inhabitants of the District, who are similarly situated, are denied that right.

The defendants' suggestion that the Overseas Voting Act "extends" State citizenship to overseas voters in a manner that could not be applied equally to residents of the District is unsound. The Supreme Court has indicated that, at least with respect to elections of state officers, a State may limit participation to "bona fide residents" who live within its geographical boundary and have the intention to make the State their home indefinitely. *See Carrington v. Rash*, 380 U.S. 89, 94 (1965).

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[46] The Act expressly specifies that "[t]he exercise of any right under this subchapter shall not affect, for purposes of any Federal, State or local tax, the residence or domicile of a person exercising such right." 42 U.S.C. § 1973ff-5.

[47] There is one difference – except for members of the Armed Forces living abroad, United States citizens overseas are there voluntarily. The political forebears of District inhabitants were ceded there without there consent.

[48] In fact, under the Overseas Voting Act, a United States citizen residing outside the United States may be eligible to participate in federal elections, even though he or she had never been eligible to participate in any election while a citizen of a State. For example, the Act applies to an overseas voter who was too young to vote while a citizen of a State.

An "overseas voter," however, does not reside within any State, and need not have any intention to make a particular State his or her home. *See Attorney General of Guam*, 738 F.2d at 1020. If Congress can disregard an overseas voter's failure to satisfy the two most basic traditional prerequisites for state citizenship, there is no reason why the fact that the overseas voter, unlike some residents of the District, was *recently* a bona fide resident of a State should be the distinction of ultimate constitutional dimension.

As the plaintiffs point out, if there is no constitutional bar to voting by overseas voters who are not "citizens of a State," there is no constitutional bar to voting by the people of the District. Accordingly, the inhabitants of the District and overseas voters are similarly situated and that the extension of voting rights to one group, but not the other, must be justified by a compelling government interest.[49]

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[49] It is true that the First Circuit has asserted that, because the Overseas Voting Act "does not infringe [the right to vote] but rather limits a state's ability to restrict it," the Act "need only have a *rational basis* to pass constitutional muster." *Igartua de la Rosa*, 32 F.3d at 10 & n.2 (emphasis added). However, the Act goes beyond checking States' restrictions on the franchise; it permits voting by electors who are not eligible to vote for the most numerous branch of a State's legislature. Thus, it affirmatively extends the right to vote to United States citizens who are not literally qualified to vote under Article I, § 2, clause 1.

In applying the principles of equal protection in the context of State elections, the Supreme Court has made it clear that strict scrutiny is applied to State "statutes distributing the franchise" which have the effect that "some resident citizens are permitted to participate and some are not." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628-29 (1969); *see also Harper*, 383 U.S. at 665. These same principles apply to the federal government through the due process clause of the Fifth Amendment—not as a formality, but because essentially the same justification for strict scrutiny of *statutes* governing the right to vote applies to both federal and state laws:

> The presumption of constitutionality and the approval given 'rational' classifications in

(continued...)

Given that inhabitants of the District and citizens of States, residents of enclaves and overseas voters are all similarly situated for equal protection purposes, and that the defendants do not argue that the government has any compelling interest in denying the right of District inhabitants to vote for voting representation in the House of Representatives, a right enjoyed by members of each of these other groups, the continued denial of that right violates equal protection principles. I have not overlooked that the defendants argue that the comparison to people in enclaves and overseas at most entitles the people of the District to vote for federal officers in State elections, not to elect their own Representatives. However, the fact that residents of enclaves and expatriates vote for federal officers in state elections does not necessarily imply that the only relief for the people of the District would be to vote in the elections of the state of Maryland. For residents of enclaves and overseas voters, voting in state elections can be seen as essentially a matter of convenience. As Marshall said about state ratifying conventions — where else should they vote? The pragmatic answer with respect to voting representation in the House of Representatives for the people of the District is that it is more convenient

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[49] (...continued)
other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Kramer, 395 U.S. at 628. The Overseas Voting Act is therefore squarely within the class of voting laws subject to strict scrutiny under the equal protection clause.

The majority also suggests that, in any event, citizens of the District who have never lived in any of the fifty states could not have an equal protection claim. The majority fails to suggest any compelling governmental interest in distinguishing between overseas voters and those District residents who have never lived in a State. Moreover, the majority apparently recognizes the violation of equal protection principles with respect to those District residents who previously have lived in a State.

and logical that the political posterity of the pre-1801 voters for representation in the House should and could use the District apparatus for electing presidents, mayors and council members, available only in the last half of the Twentieth century.

Finally, the defendants argue that if the people of the District have an equal protection right to vote in Congressional elections, so too must felons, minors and residents of territories. However, equal protection principles do not dictate such a conclusion. Felons, for example, forfeit certain constitutional rights, including the right to vote, because of their criminal conduct. The government's interests in depriving felons of their voting rights, presumably deterrence and punishment, arguably compelling interests for equal protection purposes, bear no relation to the government's ephemeral interest, if any, in depriving the people of the District of voting rights merely because of the place where they live. Moreover, the Supreme Court has held that the Fourteenth Amendment, which provides that a State's representation in Congress shall not be reduced if it disenfranchises citizens for "participation in rebellion, or other crime," U.S. Const. amend. XIV, § 2, contemplates and approves of the disenfranchisement of convicted felons. *See Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). The explicit constitutional recognition that felons can be disenfranchised, and the fact that their loss of voting rights is directly attributable to their own misconduct, is a material difference which renders untenable any comparison of their nonvoting with recognizing the voting rights of the people of the District.

Nor does the nonvoting of minors as a group preclude restoration of voting representation for the people of the District on equal protection grounds. First, there has been no showing that minors (however defined) as a class ever voted. In contrast, residents of the District voted for a Member of the House of Representatives until 1801. Second, minors have never been considered as having the

same constitutional rights as adults. *See Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995) (upholding random urinalysis testing of minors in a public school); *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) ("children's rights are not coextensive with those of adults"). Finally, although this precise issue has never been addressed, I believe that the government has a compelling interest in foreclosing minors, who are presumptively not qualified by intelligence or experience to participate in its political process, from voting. If not compelling, the government's interest is certainly important, arguably the applicable standard under the equal protection clause where it is the fundamental rights of minors being infringed.[50] *Hutchins*, 188 F.3d at 541 (applying heightened scrutiny). Accordingly, denying their voting rights while enfranchising the people of the District does not violate equal protection principles.

Finally, recognizing the voting rights of the people of the District would not necessitate enfranchising residents of United States territories. *See supra* Part II.C.4. To reiterate, people residing in territories, or their political predecessors, were never part of the "people of the several states" and they have never enjoyed a constitutionally protected right to vote. Absent any such right, the people of the territories have no claim that they would be denied equal protection of the laws if District inhabitants have voting representation while the status quo is continued in the territories. For this reason,

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[50] The Supreme Court recently reaffirmed that classifications based simply on age are not suspect under the equal protection clause and are evaluated only to determine whether they bear a rational relationship to a legitimate governmental interest. *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 645 (2000); *see also Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316-17 (1976). That analysis does not dispose of the issue here, however, because a denial of the right to vote also infringes on a fundamental right which merits either strict or intermediate scrutiny.

recognizing voting rights for the people of the District would not necessitate a similar result with respect to the people in the territories.

IV

Accordingly, for the reasons set forth, the people of the District of Columbia are entitled to participate in the election of members of the United States House of Representatives. The apportionment statutes, as presently applied, interfere with the exercise of constitutional rights of residents of the District of Columbia. I would declare these statutes, as applied, unconstitutional and declare that the Secretary of Commerce has a constitutional duty to include the population of the District of Columbia in the apportionment of seats to the House of Representatives. Again, as the questions with respect to the Senate and the Control Board are not a challenge to apportionment – the basis for convening this three-judge district court – I agree that this Court should "decline to exercise any discretionary jurisdiction we may have over" those claims. *Adams v. Clinton*, 40 F. Supp.2d 1, 5 (D.D.C. 1999).

DATED:

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UNITED STATES DISTRICT JUDGE